(2)

No. 04-98

IN THE

Supreme Court of the United States

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,

Petitioner,

v.

PACIFICORP (Including UTAH POWER & LIGHT COMPANY, a division), *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PACIFICORP

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RESPONDENT PACIFICORP'S STATEMENT OF THE QUESTIONS PRESENTED

1. Does the factual determination by the lower courts that PacifiCorp lacks monopoly power in the wholesale market, (a market in which Snake River Valley Electric Association's own expert testified that there was vigorous competition), present a compelling reason for granting the petition for writ of certiorari?

2. Does the factual determination by the lower courts that the state of Idaho actively supervises the permitted anticompetitive conduct of PacifiCorp present a compelling reason for granting the petition for writ of certiorari?

3. Do the factual determinations by the trial court that PacifiCorp does not "unbundle" its services to Idaho retail customers, and that the state of Idaho does not require "unbundled" retail access, (neither of which factual determinations were challenged on appeal to the Ninth Circuit), present compelling reasons for granting the petition for writ of certiorari?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, PacifiCorp submits the following disclosure statement.

PacifiCorp is an Oregon corporation. PacifiCorp is an indirect, wholly-owned subsidiary of Scottish Power plc, a public limited company whose ordinary shares are traded on the London Stock Exchange and whose American Depository Shares are traded on the New York Stock Exchange.

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SUMMARY OF THE ARGUMENT

Snake River Valley Electric Association's ("SRVEA") petition for a writ of certiorari rests entirely on its disagreement with the factual determinations reached by the trial court and SRVEA's erroneous belief that the lower courts misapplied undisputed legal principles regarding jurisdictional boundaries of the Federal Energy Regulatory Commission ("FERC"). Recognizing that these issues do not offer a compelling reason to grant its petition, SRVEA struggles to fashion arguments warranting the involvement of this Court. SRVEA settles on an attempt to cloak its simple factual disputes in the garb of complex federal laws and illusory constitutional issues. But these disguises do not alter the true nature of the underlying arguments or the inability of SRVEA to support them.

SRVEA's first claim—that the trial court erroneously excluded evidence regarding PacifiCorp's purported refusal to sell it wholesale power, thereby violating *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)—merely challenges the factual determination made by the trial court, and affirmed by the Ninth Circuit, that PacifiCorp does not possess monopoly power in the *wholesale* power market. This factual determination precluded SRVEA from supporting its antitrust claim (which requires a showing of monopoly power in a relevant market) with evidence that PacifiCorp refused to sell *wholesale* power to SRVEA. The factual determination that SRVEA does not possess monopoly power in the wholesale market is supported by the evidence and is independent of, and in no way contrary to, this Court's holding in *Otter Tail*.

SRVEA's next claim—that there is inadequate state supervision over the alleged anticompetitive conduct of PacifiCorp to invoke the state action immunity doctrine—also seeks to rehash factual determinations made by the lower courts. The lower courts concluded that the state of Idaho, through its statutes and the proceedings of the Idaho Public Utilities Commission (the "Idaho PUC"), exercises sufficient supervision over the alleged anticompetitive conduct of PacifiCorp to support state action immunity. SRVEA's disagreement with this factual determination presents no compelling reason why this Court should grant the petition.

The final claim by SRVEA (which it did not raise below) —that the amended Electric Supplier Stabilization Act ("ESSA") violates the Commerce Clause—arises from SRVEA's misapplication of the undisputed law established by this Court in *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002). *New York* addressed the boundaries between the regulatory jurisdiction of the states and FERC by clarifying that FERC has the authority to regulate the *unbundled* transmission in interstate commerce by a public utility that is done either: (1) voluntarily by the public utility; or (2) because of a state retail program. The trial court reached the factual conclusions (again supported by the weight of admissible evidence) that PacifiCorp has not unbundled its services to Idaho retail customers, and the state of Idaho does not require unbundled retail access. Accordingly, the power granted to the state of Idaho by the amended ESSA does not impinge upon the regulatory jurisdiction of FERC.

STATEMENT OF THE CASE

I. Procedural History and Factual Background

PacifiCorp is an electric power company, providing retail electric service to customers in southeast Idaho and other states and selling wholesale power to others in the wholesale power supply market. (SRVEA's Excerpts of Record ("ER") 26-27.) As a public utility, PacifiCorp is subject to the jurisdiction of both the Idaho PUC and FERC. (*Id.*)

SRVEA is an Idaho nonprofit corporation that describes itself as a cooperative organized to acquire electric power at wholesale for resell to its members and others in areas of Idaho served by PacifiCorp. (State of Idaho's Excerpts of Record ("IER") 2.)

In December 1995, SRVEA sent PacifiCorp a letter requesting delivery of electric power, *i.e.*, wheeling, to "the existing delivery points on Utah Power's system to each of the members of [SRVEA]." (ER 110.) Beyond the fact that the letter was sent to an officer of PacifiCorp who had no responsibility over wheeling requests, the letter failed to identify SRVEA's members and other essential information that PacifiCorp needed to evaluate its ability to provide the services requested. (*Id.*; PacifiCorp's Supplemental Excerpts of Record ("SER") 176-77, 179-80, 214.)

PacifiCorp responded on January 2, 1996 by: (1) notifying SRVEA that its letter had been forwarded to PacifiCorp's Senior Vice President for Transmission Services and Wholesale Sales, Dennis Steinberg; (2) providing Mr. Steinberg's contact information to SRVEA; and (3) inviting "further discussion with him." (SER 251.)

PacifiCorp also began taking steps in anticipation of providing wheeling services to SRVEA. (*Id.*; SER 211-14.) Those steps included verifying that PacifiCorp had the transmission capacity to satisfy SRVEA's request and preparing a draft service agreement. (*Id.*)

Despite PacifiCorp's response, SRVEA chose not to contact Mr. Steinberg. (SER 200-01.) When PacifiCorp initiated a follow-up phone call, SRVEA declined to clarify its request. PacifiCorp later learned that SRVEA's "consultant," Carl Palmer, specifically directed SRVEA not to provide any information to PacifiCorp concerning SRVEA's December 18, 1995 request. (*See* SER 201, 239.)

Not having heard back from SRVEA, and thus still uncertain what SRVEA was requesting, PacifiCorp sent SRVEA *another* letter on February 16, 1996. (SER 240.) There, PacifiCorp referred SRVEA to two tariffs on file with FERC[1] and invited SRVEA to apply for service under those tariffs. (*Id.*) PacifiCorp's Manager of Contract Administration testified at trial that this was PacifiCorp's routine response to requests for wheeling it received in this time frame. (SER 219-20.)

SRVEA never filled out an application and ignored PacifiCorp's February 16, 1996 letter. (SER 218-19.) Instead, in July 1996, SRVEA filed this lawsuit in the U.S. District Court for the District of Idaho alleging that PacifiCorp had violated sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and section 3 of the Clayton Act (15 U.S.C. § 14) by refusing to: (1) sell to SRVEA PacifiCorp's electrical

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1. FERC sets or approves the rates and conditions for wheeling services like those requested by Snake River. (SER 181-82, 222.)

facilities; (2) sell to SRVEA wholesale power; and (3) wheel electric power. (IER 1-9.)

Shortly thereafter, PacifiCorp moved to dismiss SRVEA's complaint under the state action immunity doctrine. (IER 11-12.) On April 25, 1997, the trial court denied PacifiCorp's motion. (IER 31.) Although acknowledging that ESSA clearly articulated and affirmatively expressed a state policy of restraining competition for existing utility customers, the trial court held that the evidence then before it was not sufficient to establish active state supervision. (IER 27.)

Idaho subsequently moved for and was granted leave to intervene. (IER 32, 50-51.) In January 1998, Idaho moved for partial summary judgment on state action immunity grounds, contending that it *did* actively supervise its policies underlying ESSA. (IER 54-55.) PacifiCorp filed a brief in support of that motion. (SER 21.) Based on its review of the additional evidence and argument proffered by Idaho and PacifiCorp, the trial court granted partial summary judgment. (IER 77.)

On appeal, the Ninth Circuit reversed. *See Snake River Valley Elec. Ass'n v. PacifiCorp*, 238 F.3d 1189, 1190 (9th Cir. 2001) ("*Snake River I*"). In doing so, the Ninth Circuit confirmed that Idaho had clearly articulated and affirmatively expressed a policy of restraining competition for existing utility customers, but held that Idaho was not required to and, in fact, did not sufficiently supervise the policies underlying ESSA. *Id.* at 1195. The Ninth Circuit noted, however, that "[i]t should be clear that Idaho's situation . . . could be addressed by legislative action providing for supervision." *Id.*

Accepting that invitation, the Idaho Legislature called a special session resulting in the enactment of HB 1 and HB 142. *See* 200 1st ES Laws, ch. 1; 2001 Idaho Sess. Laws, ch. 29. (reproduced at IER 97-117). In those bills, the legislature clarified that ESSA, from its inception, was designed to prohibit pirating and other acts that detrimentally impacted the citizens of Idaho and the state's economy, and to confer state action immunity on utilities that complied with its provisions. *See* 2001 Idaho Sess. Laws, ch. 29, § 2

> The provision of a safe and reliable supply of electricity in a manner that prohibits the 'pirating' of consumers and discourages duplication of facilities is essential to the well-being of Idaho's citizens and its economy. . . . It was for these and other reasons that the legislature passed the Electric Supplier Stabilization Act in 1970.

See IER 98.

The legislature enacted amendments to ESSA designed to ensure that Idaho actively supervises all actions that fall within ESSA's purview. For example:

• Section 61-332B of ESSA prohibits "electric supplier[s]" from providing "electric service" to consumers that are then or have at any time previously been connected for electric services to facilities of another electric supplier, except as provided by ESSA. *See* State of Idaho's Statutory Addendum (I. Add.). A proposed new supplier may seek an exception to this otherwise absolute prohibition by petitioning the Idaho PUC under amended section 61-334B;[2] and

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2. Snake River has never petitioned the Idaho PUC for an exception under section 61-332B.

• Section 61-332D of ESSA provides that an electric supplier is not required to provide retail wheeling and/or engage in a sham wholesale transaction but *requires* an electric supplier declining to furnish wheeling service to petition the Idaho PUC for review of its action regarding a request for such service. The Idaho PUC is then *required* to review the electric supplier's action for consistency with ESSA, and to issue an order that the wheeling service either shall, or shall not, be required. *Id.*[3]

II. Summary Judgment

In November 2001, after conducting additional discovery relating to all of SRVEA's claims, PacifiCorp moved again for summary judgment asserting that, as a matter of law: (1) PacifiCorp was entitled to judgment on all claims for damages or injunctive relief after December 8, 2000—the date the ESSA amendments took effect (Idaho also renewed its state action immunity motion); (2) PacifiCorp could not be held liable for refusing to deal because SRVEA never made a specific, unambiguous request that PacifiCorp could have refused; (3) PacifiCorp was entitled to summary judgment on SRVEA's claim that PacifiCorp refused to sell wholesale power because PacifiCorp did not have monopoly power in the wholesale power market; and (4) PacifiCorp could not be held liable for violating federal antitrust laws because it reasonably relied, in good faith, on the public policy expressed in ESSA. (SER 25-26.)

On February 7, 2002, the trial court granted PacifiCorp's motion on all but one of SRVEA's claims. (ER 90.) First, the trial court dismissed SRVEA's claim that PacifiCorp violated antitrust laws by failing to sell SRVEA wholesale power.

3. PacifiCorp filed a petition to have the Idaho PUC review its response to Snake River's purported request. That petition is currently before the Idaho PUC.

(ER 89.) The court concluded that PacifiCorp could not be liable because the undisputed facts established that: (1) PacifiCorp did not hold a monopoly in the wholesale power market and (2) SRVEA had obtained a firm commitment and contract from another supplier in that market on competitive terms. Second, the court held that the state action immunity doctrine was applicable because "[n]ot only do the amendments [of ESSA] mandate Idaho PUC review of PacifiCorp's refusal to wheel, but the Idaho PUC is now undertaking that very review." (ER 87 (citations omitted).)

III. Trial

Trial proceeded on SRVEA's one remaining claim—PacifiCorp's alleged refusal to wheel—in October 2002. After an eight-day trial, the jury returned a special verdict form stating that PacifiCorp never denied a request by SRVEA that it be provided access to PacifiCorp's power lines. (SER 165-68.) The trial court then entered final judgment on behalf of PacifiCorp and dismissed all of SRVEA's claims. (ER 151.)

IV. Appeal

On November 19, 2002, SRVEA filed a notice of appeal asserting that the trial court had erred in its summary judgment rulings in favor of PacifiCorp, and in "all rulings adverse to plaintiff during the course of trial, including pretrial and trial rulings on motions in limine." (ER 114-15.) SRVEA did not, however, raise the issue of whether the amended ESSA violates the Commerce Clause—as SRVEA does now in its petition for writ of certiorari. On February 9, 2004, the Ninth Circuit issued a unanimous opinion rejecting

all of SRVEA's contentions on appeal and affirming the district court in all respects. *See Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042 (2004) ("*Snake River II*").

On July 1, 2004, SRVEA filed its petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

SRVEA bases its petition on what it perceives to be erroneous factual findings and the misapplication of undisputed law by the lower courts. Specifically, SRVEA claims that this Court's involvement is necessary to: (1) nullify the factual determination that PacifiCorp does not hold a monopoly in the wholesale power market (despite SRVEA's ability to obtain wholesale power at competitive rates from other suppliers); (2) undo the factual conclusion that the state of Idaho actively supervises the permissible anticompetitive conduct of PacifiCorp (notwithstanding the actual proceedings conducted by the Idaho Legislature and the Idaho PUC addressing the very conduct of PacifiCorp challenged by SRVEA); and (3) declare Idaho legislation void based on SRVEA's misapplication of undisputed law regarding the jurisdictional boundaries of FERC. These arguments are empty.

I. Standard for Granting a Petition for Writ of Certiorari

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Court R. 10. Under this standard, a petition for writ of certiorari is "rarely granted" when, as here, "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

II. The Lower Courts Made The Correct Factual Determination That PacifiCorp Could Not Be Liable For Refusing To Sell Wholesale Power To SRVEA Because PacifiCorp Does Not Have Monopoly Power In That Market And SRVEA Was Able To Obtain Wholesale Power At Competitive Rates

In its opening argument, SRVEA claims that the district court's exclusion of evidence at trial regarding PacifiCorp's purported refusal to sell *wholesale* power to SRVEA: (1) precluded SRVEA from presenting evidence of PacifiCorp's refusal to deal; and (2) contradicts the U.S. Supreme Court's decision in *Otter Tail*, 410 U.S. 366.[4]

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4. The heading used by SRVEA for its first argument does not correspond with the actual argument presented. Although the heading discusses whether SRVEA was required to file a request for wheeling with the FERC, the argument immediately following that heading discusses whether the lower courts erred in excluding evidence of PacifiCorp's purported refusal to sell wholesale power to SRVEA. PacifiCorp assumes that the actual argument made by SRVEA in its briefing, rather than the heading for that argument, is the relevant issue for purposes of this petition.

To the extent SRVEA does intend to rely on the heading of its first argument as an independent basis for granting its petition, SRVEA is incorrect. The district court never held that SRVEA was precluded from recovering under the antitrust laws absent proof that SRVEA filed an application for wheeling with the FERC. Rather, the district court merely allowed PacifiCorp to admit evidence of the FERC's regulatory requirement for "a good faith wheeling request," which both the trial court and the Ninth Circuit have deemed "relevant to PacifiCorp's asserted routine response to all wheeling requests." *Snake River II*, 357 F.3d at 1053

> In other words, the evidence shows the jury what PacifiCorp did when it received the incomplete request

(Cont'd)

Both the trial court and the Ninth Circuit concluded correctly that evidence about PacifiCorp's purported refusal to sell wholesale power is inapposite to whether PacifiCorp violated antitrust laws. To prevail on a claim of monopolization under section 2 of the Sherman Act, a plaintiff must demonstrate "(1) *the possession of monopoly power in the relevant market*, and (2) the willful acquisition or maintenance of that power. . . ." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (emphasis added).

As found by both the trial court and the Ninth Circuit, PacifiCorp does not possess monopoly power in the wholesale power market, and therefore does not possess the power to control prices or exclude competition in that market:

> [T]here is no evidence that PacifiCorp has a monopoly over wholesale energy transactions, in which the market is now highly competitive. SRVEA's contract with Enron illustrates that, as the record reflects, there is a vigorous competitive market for wholesale power. This precludes a claim of monopolization under Section 2 of the Sherman Act.

(Cont'd)

> from SRVEA. This ground for admission provides ample basis for us to conclude that the district court did not abuse its discretion. SRVEA's complaints about this evidence, in our view, go to weight, not to admissibility.

Moreover, "SRVEA waived its objection to this evidence in that the regulations were used to question one of SRVEA's experts, and SRVEA declined to object when PacifiCorp moved to take judicial notice of the regulations of the FERC." *Id.*

Snake River II, 357 F.3d at 1052.[5] Accordingly, a refusal by PacifiCorp to sell wholesale power to SRVEA cannot support a claim of monopolization.

The finding by the trial court and the Ninth Circuit that PacifiCorp lacks monopoly power in the wholesale power market is independent of, and does not conflict with, the holding in *Otter Tail*, 410 U.S. 366. Although there were allegations that the defendant in *Otter Tail* refused to sell the plaintiffs wholesale power, the *Otter Tail* Court did not have before it a motion for summary judgment on the absence of monopoly power. Indeed, the primary defense raised in *Otter Tail* was that the Federal Power Act gave the defendant immunity. The Court did not have before it, and did not decide, whether Otter Tail could be liable for violating the antitrust laws in the wholesale power market when, as here, it did not have monopoly power and when the plaintiffs were able to obtain contracts at competitive rates. Accordingly, *Otter Tail* is inapposite.[6] *Snake River II*, 357 F.3d at 1051 ("It was the refusal to wheel, not the refusal to sell wholesale power, that was the crux of the antitrust violation, because

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5. The Ninth Circuit further bolstered the conclusion that PacifiCorp did not hold monopoly power in the wholesale power market by acknowledging that "SRVEA's own expert testified that there is vigorous competition in the wholesale power market, competition that did not exist at the time of *Otter Tail*." *Id.*

6. Further, in the 1970s the municipalities in *Otter Tail* did not have the access to the wholesale market afforded by the Energy Policy Act of 1992 and FERC Order 888, issued in 1996, for open access wheeling. In contrast, Snake River not only had such access, it *in fact* entered into a wholesale power contract with Enron at "competitive rates" for delivery of power to receipt points in or near the areas it wanted to serve. (SER 75.)

Otter Tail had monopoly power in the former, not the latter.").[7]

III. The District Court And The Ninth Circuit Ruled Correctly That PacifiCorp Enjoys "State Action" Immunity As Of December 8, 2000, Under The Amended ESSA

SRVEA contends that the district court and the Ninth Circuit erred in making the factual determination that the state of Idaho actively supervises the permitted anticompetitive conduct of PacifiCorp—thereby precluding SRVEA from recovering damages after December 8, 2000

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7. SRVEA challenges the district court's evidentiary ruling in limine preventing SRVEA from introducing PacifiCorp's stipulation that, if antitrust liability was proven and if Enron terminated its contract with SRVEA, PacifiCorp would step into the shoes of Enron—a stipulation offered by PacifiCorp to negate the element of irreparable harm on the preliminary injunction motion. The district court reasoned that the stipulation was irrelevant at the time of the motion in limine because PacifiCorp was not going to contest that, after the complaint had been filed, it had refused to wheel.

In addressing the purported impropriety of the district court's in limine ruling, the Ninth Circuit noted that the district court had conditioned its ruling by specifying that the ruling was "without prejudice to SRVEA's right to proffer the evidence during trial if the door is opened." *Snake River II*, 357 F.3d at 1052-53. Although it concluded that the door had not been opened at trial, the Ninth Circuit held that even if the door had been opened, "SRVEA did not proffer the evidence once the door had assertedly been opened." Thus "SRVEA, by its inaction at trial, has waived this issue in the sense that it cannot show harm from the district court's in limine ruling." *Id.* (citing *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992)).

(the effective date of the amended ESSA). This claim is both moot[8] and incorrect.

The test for state action immunity, often called the "*Midcal* test," is that: (1) the challenged restraint must reflect a clearly articulated state policy that permits the anti-competitive conduct; and (2) the permitted anticompetitive activities are actively supervised by the state. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). SRVEA does not contend that the lower courts applied the wrong legal standard for determining if state action immunity exists. Rather, SRVEA disputes only the satisfaction of the second prong on the ground the lower courts made the erroneous factual finding that the state of Idaho actively supervises the alleged anticompetitive activities of PacifiCorp.

In analyzing whether the amended ESSA satisfies the *Midcal* test, the Ninth Circuit emphasized the importance of first understanding Idaho's current regulatory environment. *Snake River II*, 357 F.3d at 1048. This importance stems from the complex set of facts relied upon by the lower courts in concluding that active state supervision is present. The old ESSA did not prohibit retail wheeling. *Id.* Rather, the old

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8. All arguments by SRVEA regarding the allegedly improper invocation of the state action immunity doctrine by the district court and the Ninth Circuit to exclude evidence of damages after December 8, 2000 are moot. The jury did not find PacifiCorp liable of an antitrust violation and, therefore, never reached the issue of damages—specifically, the issue of whether SRVEA sustained damages after December 8, 2000. Stated alternatively, the finding by the jury that PacifiCorp did not violate antitrust laws eliminates the issue of whether SRVEA *should have been* able to recover additional damages after December 8, 2000 *if* the jury had found PacifiCorp liable.

ESSA prohibited an entrant electrical supplier like SRVEA from servicing the territory or customer of another supplier like PacifiCorp without the written consent of the current supplier. *Id.* Stated alternatively, SRVEA could not supply power to PacifiCorp's customers without PacifiCorp's written consent. Under the old ESSA, therefore, the only anticompetitive action by PacifiCorp potentially eligible for state action immunity was its decision to withhold consent from Snake River to provide power to PacifiCorp's customers. *Id.* It was this action by PacifiCorp that the Ninth Circuit in *Snake River I* decided was inadequately regulated by the state to satisfy the active supervision prong of the *Midcal* test.

In response to *Snake River I*, the Idaho Legislature amended ESSA in two ways that are significant here. First, the legislature enacted section 61-332D, which allows an electrical supplier to refuse any request for wheeling that "results in retail wheeling and/or a sham wholesale transaction." Idaho Code § 61-332D(1) (Michie 2004). Following such a refusal, the electrical supplier is required to petition the Idaho PUC for a review of whether the supplier's actions are consistent with ESSA. *Id.* § 61-332D(2) (Michie 2004). Second, the legislature amended section 61-332B to prohibit an electrical supplier, such as SRVEA, from serving consumers or former consumers of another electrical supplier, such as PacifiCorp, absent an order from the Idaho PUC authorizing the service. *See* Idaho Code § 61-334B (Michie 2004).

Under this regulatory scheme, SRVEA must clear two hurdles before providing electrical service to PacifiCorp's customers. First, SRVEA must persuade PacifiCorp to wheel power to the area SRVEA intends to service. Second,

assuming power is wheeled by PacifiCorp, any SRVEA "pirating," within the meaning of ESSA, of those past or current customers of PacifiCorp would be prohibited absent an order from the Idaho PUC under section 61-332B.

Given these regulatory provisions, both the district court and the Ninth Circuit concluded that the second prong of the *Midcal* test—that the state "exercise ultimate control over the challenged [private] anticompetitive conduct"—is satisfied by the state of Idaho. *See Snake River I*, 238 F.3d at 1193 (citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992)). To meet this prong, PacifiCorp must prove that: (1) the state has the power to exercise control over the private anticompetitive conduct; and (2) the state in fact exercises that power. *See FTC*, 504 U.S. at 634 (1992) ("The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.").

The amended ESSA makes clear that the state of Idaho exercises ultimate control over the potentially anticompetitive conduct of PacifiCorp. *Snake River II*, 357 F.3d at 1049. This authority is codified in Idaho Code § 61-332D, which grants the state the power to control whether a refusal to wheel should be approved or reversed. The remaining issue concerns the exercise of that power.

The amended ESSA gives the Idaho PUC the authority to reverse refusals to wheel by PacifiCorp that conflict with the policies of ESSA. The amended ESSA also provides that the party refusing to wheel (here, PacifiCorp) *must* invoke the exercise of state power. *See* Idaho Code § 61-332D(2) (stating that "electrical supplier declining to furnish wheeling

service . . . *shall* petition the commission for review of [its] action. . . .") (emphasis added). On April 13, 2001, PacifiCorp filed its section 61-332D petition. Once the petition was filed, the Idaho PUC exercised control by virtue of its proceedings, in which both PacifiCorp and SRVEA presented extensive briefing and argument. In those proceedings, the Idaho PUC rejected PacifiCorp's motion for summary judgment and SRVEA's motion to dismiss, indicating that further proceedings are necessary. It is the existence of remaining proceedings that SRVEA relies upon in arguing that the Idaho PUC has failed to actively supervise the refusal by PacifiCorp. This argument lacks merit.

Beyond adopting the above analysis, the Ninth Circuit expressed an additional ground for its decision that the state of Idaho actively supervises the alleged anticompetitive conduct in this litigation. *Snake River II*, 357 F.3d at 1050-51. The amended ESSA prohibits an entrant supplier from "pirating" the present or past customers of a public utility unless the Idaho PUC grants an exception permitting such conduct. *See* Idaho Code § 61-332B, 61-334B (2004). Because a current electrical supplier like PacifiCorp has no independent power to permit a new supplier to service its existing or former customers, the second prong of the *Midcal* test is adequately satisfied in the sense that the state exercises ultimate control over transfer of customers. There is no other actor, including the public utility that is or was servicing the customers, with control over whether a new supplier can gain these customers. *Cf. Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (suggesting that statute that fixed price margin between wholesale and retail prices may amount to active state supervision without actual state supervision over each decision on prices); *FTC*, 504 U.S. at 640 (citing approvingly *Duffy* language).

IV. The Amended ESSA Does Not Encroach Upon The Jurisdiction Of FERC

SRVEA alleges the state action immunity doctrine cannot be invoked in this case because the amended ESSA—the legislation supporting that defense—is unconstitutional. Specifically, SRVEA alleges that the amended ESSA violates the Commerce Clause of the U.S. Constitution by usurping the jurisdictional powers of FERC. This argument is procedurally barred and incorrect.

A. The Issue Of Whether The Amended ESSA Violates The Commerce Clause Was Not Presented To The Ninth Circuit And Cannot Be Raised Here

The Ninth Circuit Court of Appeals was not permitted by SRVEA to opine on the issue of whether the amended ESSA violates the Commerce Clause. Instead, SRVEA argued only that the amended ESSA violates the Contracts Clause—a distinct argument rejected by the Ninth Circuit. *Snake River II*, 357 F.3d at 1051 n.9 (rejecting argument by SRVEA that amended ESSA violates Contracts Clause). This Court has held that a petitioner is precluded from attacking a judgment on grounds other than those presented in the court below. *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001)

> Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, . . . it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those

> arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.

Because SRVEA did not argue before the Ninth Circuit that the amended ESSA violates the Commerce Clause, it cannot now attack the Ninth Circuit's decision on that ground.

B. The Amended ESSA Does Not Violate The Commerce Clause

The claim by SRVEA that the amended ESSA violates the Commerce Clause rests on SRVEA's misapplication of the undisputed legal principles regarding the regulatory jurisdiction of the states and FERC established in *New York*, 535 U.S. 1 (2002).

States have the power to regulate transmission to the ultimate consumer, to determine the retail marketing areas of utilities, and to prescribe end-user services that those utilities must provide:

> [S]tates have the authority to determine the retail marketing areas of electric utilities within their jurisdictions, and the end user services that those utilities must provide. . . . [O]ur statement regarding state authority over the 'service' of delivering electric energy is intended to recognize the historical and local nature of delivering power to end users and the states' legitimate concerns and responsibilities in regulating local matters.

Order No. 888-A; Order on Rehearing, FERC Stats. & Regs., Regulations Preambles ¶ 31,048, at 30,344-45.

FERC, on the other hand, has the authority to regulate the *unbundled* transmission of power in interstate commerce that is done by a public utility either: (1) voluntarily; or (2) because of a state retail program. *See New York*, 535 U.S. at 11-12 ("Thus, '*if* a public utility voluntarily offers *unbundled* retail access,' or *if* a State requires *unbundled* retail access, 'the affected retail customer *must* obtain its unbundled transmission service under a non-discriminatory transmission tariff on file with the Commission.'" (first through fourth emphases added; citation omitted)). A transmission is "unbundled" when the utility separates the cost of transmission from the cost of the electrical energy when billing its retail customers.

SRVEA argues that the power granted to the state of Idaho under the amended ESSA to deny SRVEA's request that PacifiCorp wheel wholesale power for resale to SRVEA's members conflicts with this Court's decision in *New York*. SRVEA misapplies the holding in *New York*. *New York* clarifies that the type of conflict cited by SRVEA arises only *if*: (1) a public utility voluntarily offered unbundled retail access, or *if* the state required unbundled retail access; *and* (2) the state asserted jurisdiction over the rates, terms, and condition of the transmission service. The first prerequisite—that there be *unbundled* retail access—does not exist here. The trial court made the specific factual determination that "[t]here is no evidence in the record that PacifiCorp has unbundled its services to Idaho retail customers or that the State of Idaho has required unbundled retail access." (Memorandum Decision and Order at 11.) SRVEA presents no reason why this factual determination is erroneous.

Because the state of Idaho does not offer unbundled retail access, the amended ESSA does not conflict with *New York* and does not violate the Commerce Clause.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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